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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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JOSEPH L NEWMAN, as Chapter 7 Trustee for the Estate of Victoria Lazorik, Debtor,

Plaintiff,

INDEX NO. 101745/08

-against-

THE OLD GLORY REAL ESTATE CORPORATION and DELIDAKIS CONSTRUCTION CO. INC.,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for personal injuries, defendant The Old Glory Real Estate Corporation ("Old Glory") moves for an order pursuant to CPLR 317 and CPLR 5015 vacating the default judgment entered against it on July 9, 2009 in the sum of $766,848.7.[1] Upon vacatur, Old Glory moves for an order pursuant to CPLR 3211(a)(1) and (5) dismissing the complaint based on a worker's compensation award made for the same injury alleged in the complaint.

"The decision as to the setting aside of a default in answering is generally left to the sound discretion of the Supreme Court, the exercise of which generally will not be disturbed if there is support in the record." Calderon v. 163 Ocean Tenants Corp., 27 AD3d 410 (2nd Dept 2006)(quoting MacMarty, Inc. v. Scheller, 201 AD2d 706 [1994]). CPLR 317 states, in part, that "[a] person served with a summons other than by personal delivery to him or to his agent for service under [CPLR] 318 . . . may be allowed to defend the action within one year after he

[1]The Hon. Ira Gammerman, J.H.O. held an inquest on April 14, 2009, and awarded plaintiff a judgment against both defendants, jointly and severally, in the amount of $750,000. Only defendant Old Glory is moving the vacate the default judgment.

obtains knowledge of entry of the judgment . . . upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense."

To obtain relief pursuant to CPLR 317, a defendant is not required to demonstrate a reasonable excuse for its delay or default in answering or appearing. See Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 NY2d 138 (1986); Franklin v. 172 Audubon Corp., 32 AD3d 454 (2nd Dept 2006); Lopez v. 592-600 Union Avenue Corp., 292 AD2d 262 (1st Dept 2002). In addition, it is well settled that service on a corporation by delivering process to the Secretary of State is not "personal delivery" to the corporation or to an agent designated under CPLR 318. See Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., supra.

As the Court of Appeals points out, "corporate defendants served under Business Corporation Law §306 have frequently obtained relief from default judgments where they had a wrong address on file with the Secretary of State, and consequently, did not receive actual notice of the action in time to defend." Id at 142; accord Hon-Kuen Lo v. Gong Park Realty Corp., 16 AD3d 553 (2nd Dept 2005); Grasso v. MTO Associates Ltd Partnership, 12 AD3d 402 (2nd Dept 2004); Raiola v. 1944 Holding Ltd, 1 AD3d 296 (1st Dept 2003); Brockington v. Brookfield Development Corp., 308 AD2d 498 (2nd Dept 2003); Ford v. 536 East 5th Street Equities, Inc., 304 AD2d 615 (2nd Dept 2003).

Usually, in those cases where CPLR 317 relief has been denied, courts have determined that a defendant's failure to personally receive notice of the summons resulted from a deliberate attempt to avoid such notice, see Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., supra at 143; Labozzetta v. Fabbro, 22 AD3d 644 (2nd Dept 2005), or that the defendant failed to establish a meritorious defense, see CIT Group/Commercial Services, Inc. v. 160-09 Jamaica

Avenue Ltd Partnership, 25 AD3d 301 (1st Dept 2006); Lopez v. 592-600 Union Avenue Corp., supra.

Here, defendant Old Glory has made a sufficient showing to vacate the judgment pursuant to CPLR 317. First, the motion was timely made within year after plaintiff obtained knowledge of the entry of the judgment, as Old Glory submits an affidavit that it did not become aware of the action until late June 2009, when it received the June 17, 2009 letter from plaintiff's counsel enclosing a copy of the summons and verified complaint. Second, Old Glory was served by delivery of process on the Secretary of State, rather than by personal delivery.

Thus, Old Glory's affidavit and supporting documentation sufficiently demonstrate that it did not receive personal notice of the summons in time to defend, and the record neither shows nor suggests that it deliberately attempted to avoid notice of the action by listing the address of the building with the Secretary of State. Notably, Old Glory's Secretary of State registration lists two additional address, including the address of the principal of the corporation Diane Nardone at 11 Fifth Avenue, New York, New York and the address of the corporation's "executive office" at Winoken Realty Co., Inc., at 462 7th Avenue, New York, New York. In fact, the June 17, 2009 letter was mailed to Old Glory at the latter address.

Old Glory is also entitled to vacate the default judgment pursuant to CPLR 5015(a). As a general rule, a defendant opposing a motion for a default judgment or seeking to vacate its default in answering, must demonstrate a reasonable excuse for the default, and the existence of a meritorious defense. See CPLR 5015(a); Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 NY2d 138, 141 (1986); Theatre Row Phase II Assocs v. H & I, Inc., 27 AD3d 216 (1st Dept 2006). Public policy, however, favors the resolution of cases on the merits, and courts have

broad discretion to grant relief from pleading defaults where the defaulting party has a meritorious defense, the default was not willful, and the opposing party is not prejudiced. See Harris v. City of New York, 30 AD3d 461 (2nd Dept 2006); Heslek's West 38th Street Corp. v. Gotham Construction Co., LLC, 14 AD3d 306 (1st Dept 2005).

Old Glory has established that it has a meritorious defense of worker's compensation, which would provide a complete defense to plaintiff's claim. Old Glory submits an affidavit of its President, Diane C. Nardone, stating that Old Glory is the owner of a commercial co-operative office building located at 85 Fifth Avenue, and that from August 8, 1995 to 2006, plaintiff Victoria Lazorik was employed by Old Glory as a service elevator operator. Nardone also states that Lazorik's sole remedy is limited to a worker's compensation claim, which she filed in November 2006 and resulted in an award of approximately $17,760 in May 2007. Old Glory submits several documents from Lazorik's worker's compensation case which list the date of the accident as February 14, 2005, which is the identical date of the accident underlying the instant action. Lazorik submits an affidavit admitting that she was working at the building owned by Old Glory at the time of the accident, but alleges that she was employed by Old Glory's managing agent, Winoken Realty Company and Charwin Management Corp., the entity listed on her 2004 W-2 statement. While some of the worker's compensation documents list Charwin as Lazorik's "employer," other documents indicate Old Glory as the employer. Old Glory asserts that Charwin was its "payroll service," and not Lazorik's employer. Thus, while the various employment-related documents submitted by the parties are inconclusive, for the purposes of the instant motion, they are sufficient to establish the meritorious nature of Old Glory's worker's compensation defense.

As noted above, Old Glory's excuse for its default in not answering the complaint is that it did not receive notice of the action until it received the June 17, 2009 letter from plaintiff's counsel, enclosing copies of the summons and verified complaint. Old Glory's President Nardone, states that the address used by the Secretary of State for mailing process was the address of the building at 85 Fifth Avenue, to the attention of "President." Nardone states that she was the President in 2008 and did not receive a copy of the summons and complaint. She also states that Old Glory does not maintain an office in the building, which is occupied by "many companies," and that [a]ny one of the possible 'presidents' of the corporations located in the building could have received papers forwarded by the Secretary of State, however no such papers were ever brought to my attention. Had I received the summons and complaint, I would certainly have forwarded such papers to our insurance carrier for defense. Old Glory did not know of the proceeding and would never have defaulted had it known of its existence. As it is, the papers received in June 2009 were immediately forwarded to the carrier."

Under the circumstances presented, where plaintiff does not allege any demonstrable prejudice, where the record contains no evidence that Old Glory's default was willful, and in view of Old Glory's meritorious worker's compensation defense and the strong public policy favoring the resolution of disputes on the merits, Old Glory has made a sufficient showing to vacate its default. See Harris v. City of New York, supra; Theatre Row Phase II Assocs v. H & I, Inc., supra; Heslek's West 38th Street Corp. v. Gotham Construction Co., LLC, supra; Stephenson v. Hotel Employees, Restaurant Employees Union Local 100, 293 AD2d 324 (1st Dept 2002); Navarro v. A. Trenkman Estate, Inc., 279 AD2d 257 (1st Dept 2001).

The portion of Old Glory's motion for an order pursuant to CPLR 3211(a)(1) and (7)

dismissing the complaint based on the worker's compensation award, is denied. As discussed above, the record does not conclusively establish that Old Glory was plaintiff's employer at the time of the accident.

Accordingly, it is hereby

ORDERED that the motion by defendant The Old Glory Real Estate Corporation for an order vacating the default judgment entered against it on July 9, 2009, is granted and the judgment is hereby vacated as against said defendant, and the action is severed and shall continue as to said defendant; and it is further

ORDERED that the portion of Old Glory's motion for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint is denied; and it is further

ORDERED that within 20 days of the date of this decision and order, defendant The Old Glory Real Estate Corporation shall serve and file an answer to the complaint; and it is further

ORDERED that the Clerk shall restore this action to the court's conference calendar for June 3, 2010; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on June 3, 2010 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: April 19, 2010

ENTER:

J.S.C.
HON. JOAN A. MADDEN